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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 379

SAMUEL SOSA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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To: The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner, Samuel Sosa, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the District Court wherein petitioner was convicted of the crime of unlawfully, wilfully and knowingly conspiring to combine and confederate with Julio Argumedo and other persons unknown to receive, conceal, buy, sell and facilitate the transportation and concealment of unlawfully imported heroin.

OPINION BELOW.

No opinion was rendered in the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the United States Court of Appeals is printed in the Appendix hereto.

STATEMENT OF JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 22, 1967. The Petition for Rehearing was denied on June 15, 1967. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1), 62 Stat. 928, and under the supervisory powers of the Supreme Court of the United States over Federal Courts.

QUESTION PRESENTED.

Whether, where in a trial an informer was the only person who could or could not corroborate the Government's sole witness on Petitioner's participation in an alleged conspiracy, and the non production of the informer and the giving of a vague, inadequate and indefinite address is fairness comporting with fundamental due process and is a deprivation of defendant's right to a fair and impartial trial where the Government elicited testimony as to the informer, said procedure in the lower Court being in conflict with *Roviaro* v. *United States,* 353 U.S. 53 and *McCray* v. *Illinois,* 18 L. ed. 2nd 62.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF CASE.

Petitioner, Samuel Sosa, was indicted for the crime of unlawfully, wilfully and knowingly conspiring to combine and confederate with Julio Argumedo and other persons unknown to receive, conceal, buy, sell and facilitate the transportation and concealment of unlawfully imported heroin in violation of Section 174 U.S. 21 United States Code.

One Government narcotic agent testified that he was introduced to the Petitioner in Petitioner's tavern in Chicago, Illinois, and subsequent thereto engaged in certain conversations with the Petitioner wherein narcotics and the purchase thereof were discussed. Subsequent thereto narcotics were found in the possession of the co-defendant, Julio Argumedo. Any and all conversations between the Petitioner and the agent as alleged by the witnesses took place in Petitioner's tavern. Petitioner denied on trial that he discussed narcotics with the agent and denied that he was introduced to the agent by an informer. The agent's testimony as to the introduction and as to conversations with the Petitioner was not corroborated in any way, shape or form.

The trial Court was of the opinion that the informer was a non participant in the crime, but allowed disclosure after Petitioner stated that he wished to call the informer as a witness to impeach and to contradict the testimony of the agent. Disclosure consisted of the name of the informer and the address, "to the best of his knowledge, your Honor, it is 701 W. Belmont".

REASONS FOR GRANTING THE WRIT.

The Court of Appeals in its Opinion stated that the name and address of the informer had been furnished and that the informer was not a participant in the crime. As argued before the Circuit Court of Appeals, the giving of this information was as if giving no information at all. Not only was the information totally inadequate and vague, it shifted the burden upon the Petitioner to prove his innocence. The Opinion states that what the Government did was "fairness" and more was not required. This is assuming that an address was given. The Petitioner claims no address was given, and therefore, there was not fairness comporting with due process, so that Petitioner could receive an impartial trial. "701 W. Belmont" encompasses more than one city in the Cook County area in Illinois.

The Opinion that the informer was not a participant is assumption only. On both these points the Court begged the question. No where in its Opinion does the Court cite cases or precedent to sustain its position. In the case at bar, it is not uncontradicted that only the agent testified as to Petitioner's conversations with him and these conversations took place in Petitioner's bar and were uncorroborated. The Government chose to insert into the record, testimony, that the agent was introduced to the Petitioner by an informer. In making this insidious assertion the informant's posture in this case becomes relevant. This testimony occurred in the trial of the cause and not upon a hearing on probable cause. Having elicited

this testimony, the proper address of the informer should have been disclosed or the informer produced. The agent's good faith and credibility was put in issue, he being the only witness to Petitioner's conversations.

Commencing with *Scher* v. *United States,* 305 U.S. 255, (1938), the proposition was sustained that an informer's identity is necessary where the evidence is useful to vindicate the innocence of the accused and to a proper disposition of the case, especially where this turns upon an officer's good faith.

In *McCray* v. *Illinois,* 18 L. Ed. 2d (1967), the latest word on the informer's privilege, the United States Supreme Court, in citing and discussing *Roviaro* v. *United States,* 353 U.S. 53 (1957), disclosure and other cases, in the course of its Opinion, distinguished between a hearing on probable cause and the trial itself, pointing out that a truthful verdict outweighs society's need for the informer privilege where the issue is the fundamental one of guilt or innocence. The Court stated where disclosure of an informer is relevant and helpful to the defense of an accused or is essential to a fair determination of a case, the privilege must give way.

McCray rejected the concept of compulsory disclosure at a preliminary hearing in a State case, but did not discuss that concept if it arose at the trial on the merits. Pervading throughout is the idea that disclosure means proper disclosure, sufficient and adequate enough to apprise the defendant of the informer's whereabouts. Where there is inadequate, indefinite and vague disclosure, this is as giving no information at all.

In *Dennis* v. *United States,* 384 U.S. 855, 16 L. Ed. 2d 973 (1966) a conspiracy case, the Court held, as to a defendant's rights to Grand Jury minutes,

> "• • • we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon 'assumption'."

The language in *Dennis* is especially appropriate here where both the lower Court and the Court of Appeals assumed that the informer was not a participant and the defendant was given the informer's name and address. Such assumptions were not warranted by the Record and both Courts erred in not compelling the informer to be produced and a proper disclosure given.

In the instant case the defendant denied conversations and any activity with the agent. On the basis of that record the informer should have been produced or proper disclosure given.

In *People* v. *McShann,* 50 California 2d 802, the Appellate Court stated,

> "That very evidence was in issue, however, for defendant denied that he received such calls or that he made such a sale. There was no finding that the defendant knew the informer and it cannot be assumed that he did. Such an assumption would in effect assume his guilt. • • • The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused to anything which might be material to his defense • • • 345 U.S., at 12 • • •

> Defendant denied * * * that he received the alleged telephone call. * * * Although the informer in the present case was not an eye-witness to the crime, as John Doe was in the *Roviaro* case, the prosecution's own election to introduce evidence of the telephone conversation made it imperative that it disclose the identity of the informer, for he alone could amplify or contradict the testimony of the officers. As in the *Roviaro* case nondisclosure was prejudicial error."

United States v. *Fay,* 234 F. Supp. 543 (1964) sustained the same proposition, where a telephone call from an informer was introduced into evidence by the prosecution, in a hearing on probable cause. On appeal the Circuit Court of Appeals, *United States* v. *Fay,* 344 F. 2d 625, although reversing, distinguished between probable cause and a trial, stating,

> "We believe, however, that in this area a distinction must be made between the rules at a trial to determine guilt, as in *Roviaro* and *McShann* and at a hearing to determine probable cause as in our case."

In *United States* v. *Goss,* 237 F. Supp. 26 (1965), the Court held that not only the name and address of an informer must be given to the defendant, but in addition, the informer's telephone number. *Fay* and *Goss* both quote from *Roviaro.* The privilege must give way where essential to a fair determination of a cause. In the annotation to *Scher* v. *United States,* 305 U.S. 255, the following language is applicable,

> "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."

In the case of *United States* v. *Hanna,* 341 F. 2d 906, the conviction was affirmed wherein the defendant did

not point out in what way he was prejudiced or deprived of a fair trial when asking for the disclosure. In *Firo* v. *United States,* 340 F. 2d 597 (1965), the conviction was affirmed where the defendant did not seek the identity of the informant.

In *United States* v. *Coke,* 339 F. 2d 843, and *United States* v. *Russ,* 362 F. 2d 843, the Circuit Court of Appeals in both cases held that where it is shown how and why the informer's identity would be helpful to the defendant, disclosure should be made.

The record in the instant case shows precisely that this is why the Petitioner wanted proper disclosure. In *United States* v. *Pruitt,* 331 F. 2d 232 (1964), the Government did make an attempt to locate the informer, but could not locate him even though the defendant knew the informer. Here the agent's uncorroborated testimony was thrown open to doubt and good and sufficient reason was given to the lower Court for proper disclosure.

In *Roviaro* v. *United States,* 353 U.S. 53, the defendant was convicted under 21 U.S.C. Section 174, the same Statute which the Petitioner, in the instant case, has been convicted of violating. The lower Court in that case allowed the Government to refuse the identity of an informer who had taken part in bringing about the possession of certain drugs by the defendant and who had been present at the occurrence in the alleged crime. The United States Supreme Court in compelling disclosure stated,

> "The Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the non-

> disclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment. * * * The informer was the only witness in a position to amplify or contradict the testimony of government witnesses."

In footnote 15 in *Roviaro,* the Court stated, that the trial Court erred in denying Petitioner's Motion for a Bill of Particulars in so far as it requested John Doe's identity and address and here when the informer's name and address was thus requested the Government should have been required to supply said information or suffer dismissal of that Count. The foregoing language is the position of the Petitioner.

The United States Supreme Court in 87 Supreme Court Reporter 1693, June 15, 1967, No. 956-Misc. in the case of *Fleming Smith* v. *Illinois* allowed a Petition for Writ of Certiorari to the Appellate Court of Illinois, First District on the following question,

> "Did informer's refusal to disclose his name when he testified against defendant and state's failure to disclose his name, deprive defendant of his Sixth Amendment right of confrontation?"

In *Fleming* the informer took the stand and testified but refused to divulge his correct name. The Petitioner submits that his grounds are more reasonable where the informer was not produced and insufficient disclosure given him as to the informer.

CONCLUSION.

This Court has never answered the precise question of whether the inadequate disclosure of an informer is sufficient to sustain a conviction where the Government elicits testimony that the defendant was introduced to a sole uncorroborated Government witness by an informer and then fails to produce the informer and gives totally inadequate information to locate him. The Petitioner respectfully submits that non production of the informer and inadequate information places too great a burden upon the defendant, does not comport with fairness and fundamental due process and is a gross miscarriage of justice when considered in the light of a man's guilt or innocence where an informant allegedly introduced the one uncorroborated witness of the Government to the defendant. The production of the informant and sufficient information given could have shed light at the very threshold of the case as to whether or not the informant, if any, did introduce the agent to the defendant and whether or not the informer participated in the crime.

Respectfully submitted,

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APPEARANCE.

I, Sam Adam, a member of the Bar of the Supreme Court of the United States, do hereby enter my Appearance for Samuel Sosa, Petitioner.

/s/ Sam Adam
134 North LaSalle Street
Chicago, Illinois 60602
AN 3-6073

CERTIFICATE OF SERVICE.

I, Sam Adam, an attorney of record for Samuel Sosa, Petitioner herein, depose and say that on the 14th day of July, 1967, I served a copy of the foregoing Petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

Solicitor General
Department of Justice
Washington 25, D.C.

Edward V. Hanrahan
United States Attorney
219 South Dearborn
Chicago, Illinois 60604

/s/ Sam Adam

Subscribed and sworn to before me, at Chicago, Illinois, this 14th day of July, 1967.

/s/ Agnes Ginty
Notary Public

My Commission Expires December 13, 1970.